INDEX

CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 31

LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX AND STATE OF NEW JERSEY, PETITIONER

v.

JOSEPH J. PINKUS, TRADING AS AMERICAN HEALTH AIDS COMPANY, ALSO KNOWN AS ENERGY FOOD CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey (R. 46–51, 59–62) are reported at 61 F. Supp. 610 and 71 F. Supp. 993. The opinion of the United States Court of Appeals for the Third Circuit (R. 68–74) is reported at 170 F. 2d 786.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1948 (R. 76). By order

of the Court dated January 17, 1949, time within which to file a petition for certiorari was extended to and including February 21, 1949. (R. II, 227.)[1] The petition for a writ of certiorari was filed on February 21, 1949, and was granted May 16, 1949 (R. II, 228). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the fraud order issued by the Postmaster General is supported by substantial evidence.

2. Whether the Postmaster General lacked power to issue a fraud order where the findings which supported the order were based on the opinion testimony of expert medical witnesses.

3. Whether such power is lacking if the testimony of the experts is in conflict.

4. Whether the findings in this case are adequately supported apart from any conflict in evidence.

STATUTE INVOLVED

R. S. 3929, as amended, 39 U. S. C. 259, provides in pertinent part:

> The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining

[1] The record in this proceeding is printed in two volumes. All references are to Volume I except where a Roman numeral II appears after R. to indicate that the second volume is intended.

> money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof * * *.

R. S. 4041, as amended, 39 U. S. C. 732, provides in pertinent part:

> The Postmaster General may, upon evidence satisfactory to him that any person or company * * * is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders.

STATEMENT

Respondent is the sole owner of a business in Newark, New Jersey, conducted under the trade name of "American Health Aids Company." (R. 14; II, 159.) On November 23, 1944, this concern which was doing an extensive business through the mails, receiving an average of 365 letters

daily (R. II, 8), was charged by the Solicitor of the Post Office Department with using the mails to defraud in connection with the sale of an obesity treatment called "Dr. Phillips' Kelp-I-Dine Reducing Plan" (R. 14, 15).[2]

At the hearing held on these charges the Post Office Department introduced in evidence the advertisements of the "Kelp-I-Dine Reducing

[2] The memorandum of charges read in detail (R. 14–15):

"Said concerns and persons are obtaining and attempting to obtain various remittances of money through the mails from divers persons in payment for a product known as 'Kelp-I-Dine' and a treatment known as 'Dr. Phillip's Kelp-I-Dine Reducing Plan' for the reduction of excess fat, upon pretenses, representations, and promises contained in written and printed matter sent through the mails to the effect;

"That any person, regardless of age, sex or condition of health, who follows the Kelp-I-Dine Reducing Plan will reduce fat and regain a "shapely figure' easily, quickly, naturally, surely, and without discomfort, exercise, or restriction to any special dietary regimen;

"That any person following Dr. Phillip's Kelp-I-Dine Reducing Plan will lose 3 to 5 pounds per week and at the same time 'eat plenty' food without the necessity of cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content;

"That any person following Kelp-I-Dine Plan as directed will lose weight quickly, easily, safely, and regain a shapely figure without experiencing hunger:

"That Kelp-I-Dine contains minerals (including essential iodine) that satisfy hidden hunger, false hunger that makes people overeat and add weight;

"That all doctors approve of the use of Kelp-I-Dine Reducing Plan in every case regardless of the age, sex, or condition of the user;

"Whereas, in truth and in fact, all of the aforesaid pretenses, representations and promises are false and fraudulent."

Plan," carried in national magazines and over the radio (R. II, 14–17, 29–35); various correspondence showing the use made of the mails in the sale of Kelp-I-Dine (R. II, 17–29); the material actually sent purchasers of the "Kelp-I-Dine Plan"—a two-ounce container of Kelp-I-Dine and a proposed diet; a chemical analysis of Kelp-I-Dine (R. II, 36); and the testimony of two expert witnesses—one the chief medical officer in the Department of Medicine at Gallinger Municipal Hospital who was also a professor of medicine at the Schools of Medicine of Georgetown University and George Washington University (R. II, 39–85), the other the Senior Medical Officer of the Food and Drug Administration (R. II, 86–124)—both of whom were familiar with the treatment of obesity. The respondent testified on his own behalf (R. II, 125–162) and also called as an expert witness a practicing physician from Newark, New Jersey (R. II, 169–215).

This evidence showed that respondent's obesity treatment is represented as a safe, quick, easy, and harmless method of losing weight without the use of exercise or drugs or restriction to any special dietary regimen. Advertisement of the treatment promised in bold type "Lose 3 to 5 Pounds a Week * * * Yet EAT PLENTY" (R. 16–21, 28–35). A representative advertisement reads in part (R. 17),

Follow the Kelp-I-Dine Reducing Plan.

> Simply take a half teaspoonful of Kelp-I-Dine with any meal (preferably at breakfast). Eat As You Usually Do. Don't cut Out fatty, starchy foods, just Cut Down on them. That's all there is to it!

The plan was advertised as permitting "you to eat such things as ice cream, cake, candy, beer and all the other things you like. Remember with the Kelpidine Plan, you don't cut out ice cream, cake, candy, or any other things you like to eat. You just cut down on them." (R. 19.) The advertising also stated "you won't feel hungry while you take off pounds and inches" (R. 18). Elsewhere Kelp-I-Dine is represented as satisfying hidden hunger and decreasing appetite (R. 20, 21), and the treatment is asserted to be a safe means of losing weight, even though the purchaser suffer from diabetes, rheumatism or "any other ailment" (R. 19).

The purchaser who is induced by these glowing promises to send a dollar for the "Kelp-I-Dine Reducing Plan" receives a two-ounce container of Kelp-I-Dine, a Pacific Kelp or dried seaweed, and a "suggested menu for one day" called "Dr. Phillips' Kelp-I-Dine Reducing Plan".[3] The

[3] Attached to the complaint in this proceeding, as "Schedule B", and identified there as "Dr. Phillip's Kelp-I-Dine Reducing Plan" is a copy of this Plan (R. 26–27). The suggested diet is:

Breakfast

½ grapefruit, medium

suggested diet does not contain any of the fattening foods referred to above. (R. II, 20–21.) As the chemical analysis showed and was conceded by respondent, one-half teaspoonful of this kelp, the daily dose prescribed, contains no more than .4 milligram of iodine and small quantities of other minerals (R. II, 36, 189).

The medical testimony introduced by the Post Office Department showed that kelp was valueless in the treatment of obesity, and that any loss of weight resulting from "Dr. Phillips'

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1 boiled, poached or shirred egg
1 slice thinly buttered bread
Coffee, with 3 tablespoons skimmed milk
½ teaspoonful Kelp-I-Dine

Lunch

2 crackers
Egg salad, 2 hard-cooked eggs, sliced tomato, green pepper, celery, escarole, watercress and lettuce
Jello, if desired

Dinner

Any consomme or clear soup
Broiled cod fish or other lean fish
Steamed cauliflower, use ½ small head with 1 tomato, 1 helping
Steamed rice, ¼ cup
Relish, lettuce and sliced cucumber, with dressing, 2 tablespoons
Fresh fruit salad, diced banana, 1 plum, ½ tangerine, 1 helping
Coffee or tea with 3 tablespoons skimmed milk.

Another diet, a little more liberal in its content, was apparently also sent purchasers of respondents Plan (R. II, 20–21, 91). The difference between the two was slight, however. Both provided between 800 and 1,200 calories a day (R. II, 91). In the subsequent discussion both are referred to simply as respondents' "diet" or "Plan".

Kelp-I-Dine Reducing Plan" was caused by the severe restriction on daily caloric intake prescribed by respondent's plan in his suggested daily diet. The Government's experts testified that the average American sustaining diet contains in excess of 2,000 calories a day and that the diet of the obese ordinarily contains a considerably greater caloric intake. (R. II, 55.) Obesity is ordinarily caused by overeating, although in some cases there may be other contributing conditions (R. II, 41, 202). The daily diet prescribed by respondent provides about 1,000 calories per day (R. II, 91). A person following such a rigid diet particularly if accustomed to overeating would experience discomfort from hunger which would in no way be assuaged by one-half teaspoonful of kelp daily (R. II, 44–48, 60, 89). The only possible value of kelp lies in supplying a possible "nutritional supplement for increasing daily intake of iodine from ocean vegetation" (R. 21–22),[4] to prevent iodine deficiency diseases, a precaution necessary only in certain limited areas of the country (R. II, 87–88). Such diseases have no connection with obesity and sufferers from them may be either underweight or overweight (R. II, 94). Although the diet prescribed by respondent was severe, it

[4] Respondent claimed no more than this as to the nature of Kelp on the label which, under the approval of the Food and Drug Administration, was placed on packages of Kelp-I-Dine (R. II, 147–150).

would neither necessarily, nor ordinarily, result in a loss of from three to five pounds of weight a week, since losses of that magnitude require near starvation (R. II, 91). The Government's experts further testified that a loss of from three pounds to five pounds a week is inadvisable and might be harmful even to those in good health (R. II, 70–71, 91–92, 119); further, that a severe diet, such as that prescribed by respondent, would be dangerous to patients with certain chronic diseases, such as that of the heart and kidneys (R. II, 54, 75). For these reasons treatment of obesity should be individualized and prescribed only after diagnosis (R. II, 72, 78, 91–92). While both the Government's experts admitted that they had not actually tested Kelp-I-Dine on patients, both stated themselves to be thoroughly familiar with the treatment of obesity and with the effect of iodine on the system (R. II, 40–41, 86–87, 121). Iodine, one of them testified, had been elaborately tested (R. II, 102, 116) and he had employed it himself in practice (R. II, 122). Their testimony, they stated, was in accord with the consensus of medical opinion (R. II, 60, 97). One witness conceded that at one time kelp had been believed to have properties making it useful as a diet aid, but added that this belief was no longer entertained by any medical authorities (R. II, 103, 105).

Much of the testimony given by the Government's two witnesses was corroborated by the

medical expert called by defendant. He agreed that a diet such as respondent's might prove harmful to persons suffering from tuberculosis, anemia, or diseases of the heart. (R. II, 184.) He also agreed that neither mineral deficiency diseases nor an increased daily intake of minerals have any effect upon obesity (R. II, 200, 202). While he testified at one point that Kelp-I-Dine would satisfy hidden hunger (R. II, 178), he stated at another that it would increase the appetite by working on the metabolic process (R. II, 203, 211). Although he asserted that kelp was an "anti-fat for reducing" (R. II, 169), he admitted that he knew of no doctor who had prescribed it for such purpose (R. II, 174), nor had he ever heard of anyone who had reduced while taking Kelp-I-Dine (R. II, 181). His belief that Kelp-I-Dine would facilitate the loss of weight was based on its iodine content (R. II, 176). Although he had never prescribed iodine for the treatment of obesity he was of the opinion that iodine, by increasing metabolism, might affect overweight (R. II, 174–175, 197). However, he admitted that the recommended dosage of iodine was 50 to 60 times greater than that contained in a half teaspoonful of Kelp-I-Dine to have such effect (R. II, 192). To the extent that salts of iodine were used in the treatment of obesity the ordinary dosage would be "one gram three times a day" (R. II, 192); the iodine in a half teaspoonful of Kelp-I-Dine is one-third

of a thousandth of a gram (R. II, 185). Further, iodine appeared in Kelp-I-Dine in its metallic form in which it was never prescribed (R. II, 186, 188). Finally he conceded that even were the dose effective it would take weeks before any change appeared in the basal metabolism (R. II, 200). Although he testified that the "Kelp-I-Dine Plan", would produce a loss in weight of from three to five pounds a week (R. II, 170) he admitted on a cross-examination that he based this conclusion entirely on a report of another doctor (R. II, 207, 212) and personally had no idea what diet would be necessary to produce a loss of weight in that amount (R. II, 201). His own test of Kelp-I-Dine was limited to putting some in his mouth and swallowing it with water (R. II, 190).

Viewing the obesity treatment which respondent held out in the light of the above testimony, the Post Office Department concluded that a purchaser of respondent's treatment was led to believe that Kelp-I-Dine was a valuable product for the treatment of obesity, and was not given notice that he was merely purchasing a recommended diet considered rigid and severe. On the basis of this evidence it was found that none of the representations made by respondent could be sustained: the purchaser would not be able to "eat plenty" or as he usually did; would not be able to reduce to the extent promised by respondent even if he followed the severe diet, which

might be harmful if not scientifically indicated in his particular case; and that, in any event, he would experience hunger, discomfort and strain inasmuch as the testimony established that kelp is valueless for the purpose offered, containing nothing that would prevent or satisfy the hunger incident to following a rigid diet. (R. 24–25.)

Accordingly, respondent was found to be engaged in conducting a scheme for obtaining money through the mails by means of fraudulent representations and promises as averred in the memorandum of charges (R. 26) and a fraud order was issued on May 7, 1945 (R. 12–13).[5]

Enforcement of this fraud order was permanently enjoined, however, on July 18, 1945, by the United States District Court for the District of New Jersey[6] (R. 51–54). Although the district judge had before him at the time only the complaint (R. 3–12) and three exhibits, consisting of the fraud order itself and the Solicitor's memorandum (R. 12–26), a copy of a "Typical Suggested Kelp-I-Dine Diet" (R. 26–27), and excerpts from some medical dictionaries (R. 36–42), he nevertheless held that a "* * * care-

[5] During the course of this litigation, the fraud order was limited by the Postmaster General so as to be applicable to only the American Health Aids Company, and its officers and agents as such, at Newark, New Jersey (R. 70).

[6] The permanent injunction thus ordered was later modified to a preliminary injunction pending the further order of the district court (R. 59, 51–54).

ful examination of the Solicitor's memorandum and of all the evidence adduced at the hearing * * *" led to the conclusion that there was insufficient evidence from which the Postmaster General could have found "* * * actual fraud in fact on the part of the plaintiff * * *" (R. 50). This review of the evidence, he stated, "* * * showed a divergence of opinion as to the effectiveness of the Kelpidine reducing plan and of the inherent values of kelp as employed therein * * *", which was insufficient to support a finding of fraud in fact, citing *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (R. 50).

Subsequently, on June 5, 1947, after an answer had been filed incorporating the administrative record, the court decided defendant's motion for summary judgment (R. 59–62). "Further examination" of the evidence, the court said, led to the same conclusion as that originally reached. Again referring to the *McAnnulty* case, the district judge held an injunction warranted on the ground that the fraud order had been issued by the Postmaster General in a case "* * * not within his jurisdiction * * *" (R. 60). The court is convinced, the opinion states, that the questions involved are not "the kind of question intended to be submitted for decision to a Postmaster General. The effectiveness of almost any particular method of treatment of disease is to

a greater or less extent a fruitful source of difference of opinion. The effectiveness of the treatment under plaintiff's plan, the inherent value of kelp as a reducing agent in connection with the dietary regimen, and the severity of the diet suggested are of this character, and the efficacy of any particular method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud." (R. 61.)

Subsequent to this opinion, a motion for summary judgment made by respondent was granted (R. 62–64). On appeal, the judgment of the district court was affirmed on October 25, 1948 (R. 76), one judge dissenting (R. 74–76). The majority of the court, although disagreeing with the court below that the value of the product and plan involved could not be factually proven, stated that it was "constrained to affirm the judgment of the court below upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General."

SPECIFICATION OF ERRORS TO BE URGED

1. In failing to hold that the issuance of the fraud order was based on substantial evidence.

2. In holding that the Postmaster General lacked power to base findings, in support of a fraud order, on the testimony of medical expert opinion witnesses.

3. In holding that the Postmaster General lacked power to base findings, in support of a fraud order, on the testimony of medical expert opinion witnesses, if the testimony of such witnesses was in conflict.

4. In failing to reverse the district court judgment and order the proceeding dismissed.

SUMMARY OF ARGUMENT

I

The fraud order is fully supported by more than substantial evidence, and this is sufficient to require affirmance of the Postmaster General's findings. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, upon which the lower courts relied, does not justify disregarding the evidence of the Government's expert witnesses.

II

A. The *McAnnulty* case was concerned with an undenied allegation that a mind healing remedy was not misrepresented; the court assumed that the subject was one as to which the efficacy of the remedy was not susceptible of proof or disproof as a fact, and as to which there could be only conflicting schools of opinion. This Court and the lower courts have repeatedly held that the case does not prevent the use of expert medical opinion testimony, even when conflicting, as to the value of a remedy. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 646, which

involved another cure for obesity as to which there was conflicting medical testimony, is directly in point.

B. 1. If read as excluding from consideration all expert medical opinion testimony, the decision below is inconsistent with established principles of evidence. Since tests of products which might be harmful are often impossible, and expert opinion testimony is often the only feasible method of proof, the disqualification of such evidence would make it impossible to protect the public against fraudulent nostrums. The *McAnnulty* case is limited to matters of opinion which cannot be disproved in fact. It does not preclude the use of what may be called "opinion evidence" to prove that misrepresentations of fact are untrue. Statements that a particular product will cause a reduction in weight without hunger fall in the latter category.

2. Even if the opinion below is read as disqualifying expert testimony only when there is a conflict in medical opinion, it is equally indefensible. The introduction of conflicting evidence affects the weight, not the competence or admissibility of the testimony of the Government's witnesses. Since there are few remedies so worthless that someone cannot be found to swear to their virtues, there would be little difference in practice between such a conditional bar and the complete exclusion of expert testimony. At most,

the *McAnnulty* case indicates that the fraud order statute was not designed to permit the Postmaster General to resolve differences of opinion between two schools of medical thought as to matters not susceptible of factual proof. Certainly the mere availability to the defendants on a charge of medical fraud of a co-operative medical witness cannot in and of itself suffice to immunize their conduct.

III

In any event, there is no conflict in medical opinion as to the basic propositions which prove respondents' fraud. Respondents' medical expert admitted that the amount of iodine in the usual dosage for obesity was vastly greater than the minute quantity contained in kelp, that he had never used such a small amount or known of its prescription by any medical authority, that its effect would not be felt by the user for weeks, that the diet was rigid and severe, and that it would be harmful to persons with certain common afflictions. These statements alone were sufficient to support the findings of misrepresentation. Moreover, even if the medical testimony be completely disregarded, the fraud is proved merely by comparing respondents' advertisements with the recommended diet. For instead of permitting one to lose weight painlessly, without hunger, while eating plenty, the diet is a stringent one allowing less than one-half the normal caloric intake.

ARGUMENT

I

Since There Was Substantial Evidence To Support the Fraud Order the Courts Below Improperly Enjoined Its Enforcement

As this Court said in *Leach* v. *Carlile,* 258 U. S. 138, 139–140 "* * * the applicable, settled rule of law is that the conclusion" of the Postmaster General as to whether the product respondent "was selling * * * was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public" is one which "will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary." This rule, which had become axiomatic in the lower courts,[1] was reiterated in *Donaldson* v. *Read Magazine,* 333 U. S. 178, 186: "We consider * * * all of the evidence, not to resolve contradictory inferences, but only to determine if there was evidence to support the Postmaster General's findings of fraud. *Leach* v. *Carlile,* 258 U. S. 138, 140".

Both courts below attempted to distinguish the *Leach* case on the ground that there the product or scheme offered for sale constituted a "* * * panacea or cure-all article * * *" whereas here the fraud charged consisted of a scheme of

[1] *Farley* v. *Heininger,* 105 F. 2d 79 (C. A. D. C.), certiorari denied, 308 U. S. 587; *Farley* v. *Simmons,* 99 F. 2d 343 (C. A.

specific deception (R. 71–72).[*] But whether a product is falsely claimed to be a cure for one affliction or many cannot affect the scope of judicial review of the administrative finding. The principle governing judicial review of administrative action equally is applicable whether the product involved in a mail fraud proceeding is one sold as a remedy for dandruff or as the elixir of life. The question in either case would be whether there is substantial evidence to support the decision of the Postmaster General that the claims made for the product are so exaggerated as to perpetrate a fraud upon the public.

There can be no question as to the existence of substantial evidence to support the findings of fraud made herein by the Postmaster General. This is no border line case; all the evidence, even that introduced by respondent, discloses

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D. C.), certiorari denied, 305 U. S. 651; *Pike* v. *Walker*, 121 F. 2d 37, 73 (C. A. D. C.), certiorari denied, 314 U. S. 625; *Cable* v. *Walker*, 152 F. 2d 23 (C. A. D. C.), certiorari denied, 328 U. S. 860; *Aycock* v. *O'Brien*, 28 F. 2d 817 (C. A. 9); *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. 2d 116, 119 (C. A. 6); *Putnam* v. *Morgan*, 172 Fed. 450 (C. C. S. D. N. Y.); *Elliott Works, Inc.* v. *Frisk*, 58 F. 2d 820 (S. D. Iowa); *Branaman* v. *Harris*, 189 Fed. 461 (C. C. W. D. Mo.); *Missouri Drug Co.* v. *Wyman*, 129 Fed. 623, 629 (C. C. E. D. Mo.).

[*] The distinction clearly misapprehends the meaning to be attached to "panacea" as that word was used in the Court's opinion in *Leach* v. *Carlile*. "Panacea" refers to any scheme which exaggerates the efficacy of a product beyond the range of permissible difference of opinion, rather than to a cure-all.

fraud. Respondent in advertisements, cleverly calculated to appeal especially to the ignorant and credulous, made promises which no product known can meet—to melt fat rapidly, safely, painlessly while one ate plenty—promises which he fulfilled with a handful of dried seaweed and a suggested diet, placed at one-half subsistence level. The seaweed was worthless and the diet neither painless nor safe. The specific representation that the plan helps you lose 3 to 5 pounds a week while continuing to "eat such things as ice cream, cake, candy, beer and all the other things you like. * * * You just cut down on them" is refuted by the diet itself and its caloric content.

Respondent cannot justify its advertising by reason of the vagueness of such expressions as "Eat Plenty," or the possible literal truth of the statement that you "don't cut out fatty, starchy foods, just cut down on them", as applied to a diet which contains "one slice thinly buttered bread" per day, *inter alia* (R. 16, 26). For when read with the accompanying exhortation to "Eat Plenty * * * Eat as You Usually Do," the advertisement as a whole conveys the impression, undoubtedly deliberately, that only a minor curtailment is required. As this Court recently declared in *Donaldson* v. *Read Magazine*, 333 U. S. 178, 188–189:

> Advertisements as a whole may be completely misleading although every sentence separately considered is literally true.

> This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead. * * * Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. * * * People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. "Laws are made to protect the trusting as well as the suspicious." *Federal Trade Comm'n* v. *Standard Education Society*, 302 U. S. 112, 116.

Nevertheless, both courts below found in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, authority for overturning the action of the Postmaster General. The district court found "that there was no substantial evidence in fact, and could be none, to support the order" because, borrowing the language of the *McAnnulty* case, there is "no exact standard of absolute truth by which to prove the assertions [made for the Kelp-I-Dine plan] false and a fraud." The court of appeals did not go as far as "to say that the value of the * * * plan * * * is not subject to proof as an ordinary fact"; but it affirmed the judgment below on the ground that, here, "there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General." (R. 72.)

The testimony given by the expert witnesses the court below considered "in the nature of opinion" only, and, consequently, not competent* under the *McAnnulty* case to support the fraud order.

The *McAnnulty* case, however, will not support the burden put on it by the court below. As we shall show (*infra*, p. 24, *et seq.*), nothing in it makes testimony by medical experts incompetent in proceedings designed to reach the false advertising of nostrums. In many cases involving other weight reducing products, orders based upon similar evidence have been sustained by this and other courts. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 316 U. S. 149; *E. Griffiths Hughes* v. *Federal Trade Commission*, 77 F. 2d 886 (C. A. 2), certiorai denied, 296 U. S. 617; *Fanning* v. *Williams*, 173 F. 2d 95 (C. A. 9); *United States* v. *62 Packages*, 142 F. 2d 107 (C. A. 7), certiorari denied *sub nom. Raladam Co.* v. *United States*, 323 U. S. 731; *Sekov Corp.* v. *United States*, 139 F. 2d 197 (C. A. 5); *Stanton* v. *Federal Trade Commission*, 131 F. 2d 105 (C. A. 10). Thus, there can be no question that the court below was in error in

*Although the Court of Appeals did not in terms describe the expert evidence as incompetent or inadmissible, it did hold that such evidence could not be considered in support of the order. Since the effect is precisely the same as if such evidence had been held not competent, it seems proper so to characterize the decision.

holding that the fraud order was not supported by substantial evidence.

II

Expert Medical Testimony, Even Though There Is a Conflict in The Evidence, Is Competent to Support a Finding of Fraud by the Postmaster General

In weighing the propriety of the action taken by the Postmaster General, the court below excluded from consideration all the testimony given by the medical experts on the ground that it was "evidence in the nature of opinion" only, based upon discussions with other members of the profession and a general reading of authoritative textbooks, not "ordinary factual evidence" founded upon "scientific research and tests," and that the testimony indicated "that with respect to the efficacy of appellee's product and plan there are two schools of thought, albeit one may be outmoded and fallacious in the opinion of a majority of the * * * medical profession" (R. 73, 74). The court's opinion leaves in doubt whether expert medical testimony of this sort would be insufficient to support a finding of fraud under all circumstances or only where a conflict in such testimony, or other evidence, indicated a difference of opinion in the medical world. We shall show that whichever view is taken, the opinion below cannot be reconciled with this Court's decisions or with a long line of decisions in the lower

courts which this Court has repeatedly refused to review.

A. THE MCANNULTY CASE AND THE SUBSEQUENT AUTHORITIES

As authority for its opinion the court below relies almost exclusively on *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. The complaint in that case alleged that the complainants were doing business on the theory "that the mind of the human race is largely responsible for its ills" and that "proper exercise of the faculty of the brain and mind" can "control and remedy" these ills. *Id.* at 96. It further alleged that "no fraud, deceit, deception or misrepresentation of any kind has ever been practised by them" and that those who received the treatment did so with knowledge of the principle upon which it was based. (*Id.* at 101.) The Government filed a demurrer, apparently on the ground that under the statute the Postmaster General's ruling was unreviewable.[10] Thus under the pleadings these allegations that the complainants' representations were not deceptive stood admitted; the court did not have before it any record of a hearing containing expert or other testimony, but merely a recital that the representations were not false and that the Postmaster General had made a

[10] In denying a temporary injunction prior to the filing of the demurrer the lower court had so held. See Transcript of Record, October Term 1902, No. 27, pp. 7, 14, 15, 19–23; Brief for Appellants, pp. 2–3.

contrary finding. On this state of facts it was held that the Postmaster General lacked the power to issue a fraud order. "There is no exact standard of absolute truth" this Court said, by which to prove the claim of the ability to effect cures through the mind "false and a fraud." It cannot be "the subject of proof as of an ordinary fact." Since "intelligent people may and indeed do differ among themselves" as to the effect of the mind upon the body the efficacy of the treatment must remain "matter of opinion in any court." Therefore, the Court concluded fraud could not be found, as it could not be "proved as matter of fact" that those who entertain the opinion that diseases can be cured through the mind "obtain their money by false pretenses or promises" (187 U. S. at 103–107). The opinion did not foreclose the Government from disproving the allegations of the complaint at the trial.[11]

In the *McAnnulty* case there was an undenied allegation that the representations were true; that obviously is an adequate basis for setting aside a fraud order in the absence of a record of hearing. Secondly, the Court assumed that in the year 1902 the efficacy of cure through the mind was a matter not susceptible of proof as a fact, that no one could prove that such treat-

[11] "In overruling the demurrer we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants as in fact conducted amounts to a violation of the statutes as herein construed." 187 U. S. at 111.

ments were lacking in therapeutic value. Finally, the Court treated the case as one in which there were two conflicting schools of honest medical opinion, neither of which could be proved false in fact. None of these features is present in this case or in the large number of subsequent cases involving false representations as to the curative value of medicinal preparations. Nevertheless, repeated attempts have been made—until this case, comparatively unsuccessfully—to draw from the language of the *McAnnulty* case unwarranted restrictions on the power of the Government to curb the sale of fraudulent nostrums.

This case is not the first in which this Court has been called upon to pass on the contention that the *McAnnulty* case precludes a finding of misrepresentation based on conflicting medical testimony as to the value of a remedy. The opinion below appears to conflict squarely with this Court's disposition of that question in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643. That case, like the instant one, involved a reducing aid, Marmola, whose chief active ingredient was thyroid, but which also incidentally contained dried seaweed, identified there as "Extract Bladderwrack." Transcript of Record, *Federal Trade Commission* v. *Raladam Co.*, No. 484, October Term, 1930, pp. 9, 422. Marmola was represented to be a scientific remedy which removed excess flesh safely, pleasantly, without dis-

comfort or danger to the health. At a hearing held by the Federal Trade Commission to determine if these representations were false and misleading, eleven physicians testified, six for the Commission and five for the defendant. All eleven men were, as the trial examiner found, "of high standing in their profession." (*Id.*, p. 466.) The testimony they gave was in no case based on actual use of Marmola, but rested on their general scientific knowledge, particularly of obesity and of the effect of thyroid on metabolism and weight. So sharp was the conflict in their evidence that the trial examiner found himself unable to reach a determination of the issues. *Id.*, p. 468. The Commission, however, on the basis of their testimony found that Marmola did not meet the representations made for it. Among other things, the Commission found that it could not be used without discomfort, inconvenience or danger, and that it was not a scientific method for the treatment of obesity (*ibid.*, pp. 23–25). On appeal, the order entered by the Commission on these findings was attacked on two grounds. First it was urged that the representations as to the safety and scientific character of "Marmola" were matters of opinion, not fact, and consequently the determination of their truth lay outside the power of the Commission. Second, it was contended that the Commission lacked jurisdiction because the evidence showed no injury to competitors. Both

contentions were sustained by the court of appeals. *Raladam Co.* v. *Federal Trade Commission*, 42 F. 2d 430 (C. A. 6).

This Court was asked to review both points, but in granting the writ this Court requested that briefs and argument be limited to the question of jurisdiction.[12] 282 U. S. 829. The reason for this became clear in the opinion where, before passing to the question of jurisdiction, this Court summarily disposed of the alternate ground on which the Court of Appeals had based its decision. "Findings, supported by evidence, warrant the conclusion that the preparation is one which cannot be used generally with safety to physical health except under medical direction and advice. If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed." 283 U. S. at 646. The Court, however, found jurisdiction lacking, because there was no evidence of injury to competitors.

So definitely did this opinion put the quietus on the contention that findings of fact could not be predicated on conflicting medical testimony as to

[12] The Raladam Company, nevertheless, forcibly argued the second point in its brief, relying heavily on extensive quotation from the *McAnnulty* case. (*Federal Trade Commission* v. *Raladam Co.*, No. 484, October Term, 1930, Brief for the Raladam Company, pp. 47–51.)

therapeutic value that when, some eleven years later, the Raladam Company again found itself before this Court in a subsequent proceeding, in which there was again conflicting medical testimony,[13] no attempt was even made to attack the order of the Commission on any ground other than jurisdiction. The contention that the representation made on behalf of Marmola was a matter of opinion, not fact, was completely abandoned. Jurisdiction being established, the order of the Commission was sustained without further inquiry. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149.

The summary rejection by this Court in *Federal Trade Commission* v. *Raladam Co.* of any attempt to extend the *McAnnulty* case beyond its facts was presaged in *Leach* v. *Carlile*, 258 U. S. 138. That case, like this, involved a mail fraud order. Relying on the *McAnnulty* case, Leach, too, argued that since there was a conflict in the evidence in the record as to the value of the substance marketed by him as a remedy for nervous disorders and sexual weakness, the effectiveness of his product was a mere matter of opinion and could not form the basis of a charge of fraud. The Court found it unnecessary to decide whether such a state of facts would bring the case within the *McAnnulty* decision, inasmuch as, apart from

[13] Nine doctors testified for the Federal Trade Commission and five for the Company. See Transcript of Record, No. 826, 1941 Term.

the possible conflict as to whether the product was "entirely worthless," there was "abundant ground" for the finding that it was not "the panacea" which it was advertised to be. But the subsequent characterization of the issue as to whether the product was such a panacea as "a question of fact * * * committed to the decision of the Postmaster General" indicates that questions of this sort are not to be regarded as mere matters of opinion.

Clearly in the *Raladam* case this Court passed upon and summarily rejected the very contention made here, and held that expert medical testimony, based on general scientific training and knowledge, constitutes substantial evidence of misrepresentation of popular nostrums, even when there is a conflict of opinion.

The lower courts have almost uniformly reached the same conclusion, contrary to that of the court below in the case at bar whether that decision be regarded as holding expert testimony always incompetent, or only when the experts do not agree. Findings of misrepresentation based on the testimony of medical experts as to the therapeutic value of the product involved have consistently been sustained as supported by substantial evidence, even though the experts were testifying from general knowledge, not specific experience with the product concerned. The courts of appeal for eight circuits have so held in 22 cases. *Farley v. Heininger*, 105 F. 2d 79, 83–84 (C. A.

D. C.), certiorari denied, 308 U. S. 587; *Warner's Renowned Remedies Co.* v. *Federal Trade Commission,* 140 F. 2d 18 (C. A. D. C.), certiorari denied, 322 U. S. 754; *Todd* v. *Federal Trade Commission,* 145 F. 2d 858 (C. A. D. C.); *Cable* v. *Walker,* 152 F. 2d 23 (C. A. D. C.), certiorari denied, 328 U. S. 860; *E. Griffiths Hughes* v. *Federal Trade Commission,* 77 F. 2d 886, 887 (C. A. 2), certiorari denied, 296 U. S. 617; *Justin Haynes & Co.* v. *Federal Trade Commission,* 105 F. 2d 988, 989 (C. A. 2), certiorari denied, 308 U. S. 616; *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 678–679 (C. A. 2); *Associated Laboratories* v. *Federal Trade Commission,* 150 F. 2d 629 (C. A. 2); *Neff* v. *Federal Trade Commission,* 117 F. 2d 495 (C. A. 4); *Goodwin* v. *United States,* 2 F. 2d 200, 201 (C. A. 6); *Summers* v. *McCoy,* 163 F. 2d 1021 (C. A. 6), certiorari denied, 323 U. S. 855; *Simpson* v. *United States,* 241 Fed. 841, 844–845 (C. A. 6); *Dr. W. B. Caldwell* v. *Federal Trade Commission,* 111 F. 2d 889, 891 (C. A. 7); *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, 169 (C. A. 7); *Irwin* v. *Federal Trade Commission,* 143 F. 2d 316, 324 (C. A. 8); *Alberty* v. *Federal Trade Commission,* 118 F. 2d 669, 670 (C. A. 9), certiorari denied, 314 U. S. 630; *John J. Fulton Co.* v. *Federal Trade Commission,* 130 F. 2d 85, 86 (C. A. 9), certiorari denied, 317 U. S. 679; *Philip R. Park, Inc.* v. *Federal Trade Commission,* 136 F. 2d 428 (C. A. 9); *Ultra-Violet Products* v. *Federal Trade*

Commission, 143 F. 2d 814, 816 (C. A. 9); *Research Laboratories* v. *United States,* 167 F. 2d 410 (C. A. 9), certiorari denied, 335 U. S. 843; *Fanning* v. *Williams,* 173 F. 2d 95 (C. A. 9); *United States* v. *One Device,* 160 F. 2d 194, 198–199 (C. A. 10); *United States* v. *Seven Jugs of Dr. Salsbury's Rakos,* 53 F. Supp. 746, 757 (D. Minn.).

And the fact that the medical testimony may have been in conflict has been held by six courts of appeals in 10 cases to be no impediment to the power of an administrative agency to resolve the questions of fact raised in proceedings involving fraudulent nostrums. *E. Griffiths Hughes* v. *Federal Trade Commission,* 77 F. 2d 886, 887 (C. A. 2), certiorari denied, 296 U. S. 617; *Justin Haynes & Co.* v. *Federal Trade Commission,* 105 F. 2d 988, 989 (C. A. 2), certiorari denied, 308 U. S. 616; *Neff* v. *Federal Trade Commission,* 117 F. 2d 495, 497 (C. A. 4); *United States* v. *Dr. David Roberts Veterinary Co.,* 104 F. 2d 785, 788 (C. A. 7); *United States* v. *62 Packages,* 142 F. 2d 107 (C. A. 7), certiorari denied *sub. nom. Raladam Co.* v. *United States,* 323 U. S. 731; *Irwin* v. *Federal Trade Commission,* 143 F. 2d 316, 323–324 (C. A. 8); *Alberty* v. *Federal Trade Commission,* 118 F. 2d 669 (C. A. 9), certiorari denied, 314 U. S. 630; *John J. Fulton Co.* v. *Federal Trade Commission,* 130 F. 2d 85, 86 (C. A. 9), certiorari denied, 317 U. S. 679; *Warner's Renowned Remedies Co.* v. *Federal*

Trade Commission, 140 F. 2d 18 (C. A. D. C.),[14] certiorari denied, 322 U. S. 754; *Todd* v. *Federal Trade Commission*, 145 F. 2d 858 (C. A. D. C.); see also, *United States* v. *Seven Jugs of Dr. Salsbury's Rakos*, 53 F. Supp. 746, 759 (D. Minn.); *Branaman* v. *Harris*, 189 Fed. 461, 467–468 (C. C. W. D. Mo.).

It is to be noted that in a number of these cases in which there was conflicting expert testimony this Court denied petitions for certiorari. See *E. Griffiths Hughes, Alberty, Warner's Renowned Remedies Co., John J. Fulton*, and *Haynes* cases, all cited in the preceding paragraph. Although this does not indicate the Court's views as to the merits of the cases, presumably certiorari would have been granted if the Court had regarded the decisions below as in conflict with its own *McAnnulty* ruling. An alleged conflict with *McAnnulty* was the primary basis for the petitions for certiorari in the *E. Griffiths Hughes, Alberty* and *Warner* cases, the first two of which involved other weight reduction remedies.

B. APART FROM AUTHORITY, THE RULE EXCLUDING EXPERT MEDICAL TESTIMONY FROM CONSIDERATION, WHETHER OR NOT IN CONFLICT, HAS NO SUPPORT IN REASON.

1. *Expert medical testimony as to lack of therapeutic value is an adequate basis for a find-*

[14] The nature of this case is not disclosed by the *per curiam* opinion of the Court of Appeals, but appears in the petition for certiorari filed in this Court.

ing of misrepresentation.—The rule excluding expert medical testimony from consideration, seemingly adopted by the court below, is not only opposed to the weight of authority but is without support of any character. If construed to render incompetent all expert testimony except that based on specific experiments, it disregards accepted and established practice concerning competent and relevant evidence. See *Spring Co.* v. *Edgar,* 99 U. S. 645, 657; *Kershaw* v. *Tilbury,* 214 Cal. 679, 691–692, 8 P. 2d 109, 114; *Boswell* v. *State,* 114 Ga. 40, 42–43, 39 S. E. 897; Wigmore, *Evidence,* (3rd Ed., 1940) Secs. 665b, 687; Rogers, *Expert Testimony* (3rd Ed., 1941), p. 72; Mundo, *The Expert Witness* (1938), pp. 38–39. Its general adoption would effectively strangle consumer protection by federal administrative agencies. In this field expert medical opinion testimony is the only feasible method of proof. A layman is incompetent to testify on medical questions, and he may not give hearsay testimony as to the conclusions of his attending physician. Thus, even in as simple a case as this, to establish by specific experiment the already well understood medical facts that were testified to by the medical experts, would require at least two separate clinical studies. One group of healthy obese individuals, and another group of overweight sufferers from kidney or heart disease, in numbers large enough to be representative and divided for control purposes, would be required to follow the "Kelp-I-Dine Plan" for a reason-

able period of time. We do not believe that the court below intended to require clinical experimentation that would actually jeopardize life. But if medical opinion evidence is incompetent, no alternative method exists for proving that respondent's diet cannot be followed "safely" by all, as is advertised, but is dangerous to persons having particular disabilities.

In fact, specific tests of fraudulent nostrums have been considered and rejected simply because of the danger to life that lurks in them. *John J. Fulton Co.* v. *Federal Trade Commission,* 130 F. 2d 85, certiorari denied, 317 U. S. 679. To require such studies, as does the court below, as a condition precedent to controlling the sales of the various nostrums that purport to cure diabetes, cancer, tuberculosis, and other equally grave ailments would mean that the Government would be faced with the impossible alternative either of jeopardizing the health, or even the lives, of a selected group in order to prove the worthlessness of a particular remedy, or of permitting the fraudulent seller to continue indefinitely endangering the lives of an indeterminate number of his uninformed patrons. The American public should not be made experimental animals through which to prove in each case as it arises those medical facts that are part of the every day working knowledge of experienced and skilled medical practitioners.

The rule announced in the decision below ignores fundamentals in present day medical practice—principal of which is that today therapeutic measures are the products of rational sciences. Knowledge of the mechanism of body functions in sickness and in health, and of drug action founded upon pharmacological studies, has made it possible to establish the medical facts on which to evaluate the true worth and the limitations of therapeutic agents. New agents must, of course, be subjected to pharmacological experimentation and clinical study, but it is foolish to suggest that elaborate trials of nostrums must be made before a qualified expert may testify as to their therapeutic value or lack of value. Any general practitioner can say with certain knowledge that kelp, a well understood article, will have no effect on body weight and that a person on 1000 calories per day will lose weight. To require confirmation in the clinic of these facts as a condition precedent to the prevention of medical fraud is without foundation in reason.

Even were experiments of this character not dangerous to life, they would be costly and time consuming, would require special facilities, and would be feasible in a limited number of cases each year. Enforcement of the various measures which protect the public against fake panaceas would be virtually brought to a standstill.

Nothing in the *McAnnulty* case justifies the refusal to consider expert testimony. The invocation of that case by the court below to bar all such testimony as "opinion" evidence is little more than a play upon words. By a "matter of opinion" this Court in the *McAnnulty* case meant a statement whose truth, not being susceptible of objective evaluation, must necessarily remain subjective; the "opinion" evidence involved here is the testimony of medical experts with respect to matters of scientific fact as to which they were qualified to testify. Although for the purpose of disqualifying all such testimony the court below arbitrarily characterized it all, regardless of content, as opinion evidence, much of it was not "expert opinion" but "expert testimony as to facts" (McKelvey, *Evidence* (5th Ed.), Secs. 181–185, pp. 338–343). Without attempting to draw any exact line of demarcation between facts and opinion, it is clear that much of the following testimony is factual in nature: that the diet prescribed by respondent was a low calorie diet; that such a diet will not necessarily produce a loss in weight of from 3 to 5 pounds a week; that it is dangerous for a person suffering from kidney or heart disease to follow a low calorie diet; that a loss of from 3 to 5 pounds a week is too rapid for health; that a person on a low calorie diet suffers discomfort and hunger which will not be affected by an increased intake of iodine, or other

minerals; and that .4 milligram of iodine a day and a small amount of mineral matter will have no effect upon weight. Obviously, it does not follow, because matters of opinion incapable of reduction to a factual basis will not support a fraud order, that matters of scientific fact cannot be established by the "opinion" or expert testimony of qualified medical witnesses in a fraud order proceeding.

An administrative agency or a court would be justified in excluding expert testimony that was nothing more than a theory or guess, but that should not be confused with the evidence involved in the present case. The testimony given was based on the actual experience of the medical profession generally in the treatment of obesity, and in the use of iodine; on knowledge of the results of specific experiments on the value of iodine; on general scientific knowledge; and on authoritative texts. It was stated to be in accord with the consensus of medical opinion. The conclusions expressed were not mere personal opinions, but were bottomed on well-known medical, pharmacological, and physiological principles established through experiments, observations and research on nutrition, metabolism, and other factors, causing weight changes in human beings. As was said in an identical case, "The testimony of the medical witness in the instant case does not lie within the realm of speculation

which characterized the *McAnnulty* case, *supra*. The susceptibility to proof of an allegation that bodily ills are controllable by the mind is one thing, the question of the effect of tablets on bodily hunger, and the safety and ease with which they may be taken, quite another. The tablets were analyzed by accepted scientific techniques and their contents established. Testimony of the effect on the body tissue of the ingredients they contain is no more 'speculative opinion' than are the known effects of swallowing sulphuric acid." *Fanning* v. *Williams, supra,* 173 F. 2d at 97.

2. *The existence of conflicting medical expert testimony does not prevent a finding of misrepresentation.*—Even if the opinion below is read as excluding expert testimony only where there is a conflict in medical opinion, it is equally indefensible. Certainly, under the general rules of the law of evidence, testimony does not become incompetent whenever contrary evidence is introduced. Its weight may be affected, but not its admissibility. Since there are few remedies so worthless that someone cannot be found to swear to their virtues, there would be little difference in practice between such a conditional bar and the complete exclusion of expert testimony. The ease with which "expert" witnesses can be obtained to testify on behalf of almost anything is well known. In the false advertising of medical products defendants have been able to produce

experts to sustain even the most extreme claims.[15] The trier of the facts should be permitted to evaluate the expert testimony and to conclude, if such be the case, that the so-called experts on one side are either ignorant or charlatans.

In *Stanton* v. *Federal Trade Commission,* 131 F. 2d 105 (C. A. 10), an order directed against another "antifat" remedy containing bladderwrack (another term for kelp) and iodine was upheld. The mere fact that the defendant here managed to get a doctor to testify in his behalf should not immunize a product which other reliable testimony proves to be worthless. The many cases referred to on pages 32–33, *supra,* including the *Raladam* decision in this Court, demonstrate that the *McAnnulty* case has not been regarded as standing for any such rule.

[15] For example, a manufacturer selling a simple device for the injection of water into the body through the rectum as a treatment for such conditions as appendicitis, arthritis, asthma, colitis, constipation, excessive fatigue, foul breath, headache, gall bladder complications, high and low blood pressure, indigestion, irregular heart, kidney and bladder complications, liver complications, lumbago, menopause disturbances, muddy or pimply complexion, migraine, nervousness, pruritis ani, rheumatism, sinus trouble, rundown condition, shortness of breath, sleeplessness, ulcers of the stomach and bowels, and ulcerated colitis, was able to secure two witnesses duly licensed to practice as chiropractors and qualified as experts to support his claims. *Irwin* v. *Federal Trade Commission,* 143 F. 2d 316 (C. A. 8).

For, as we have shown, *supra*, pp. 37–38, matters of the sort here involved are essentially factual. Whether kelp is a remedy for obesity is provable as a fact. The Court assumed in the *McAnnulty* case that this was not true as to remedies operating upon the mind.[16] But the Court in that case did not say that matters provable in fact could not be proved by expert evidence based upon general familiarity with a scientific subject, nor that such evidence must be disregarded whenever conflicting testimony appears. At most, the *McAnnulty* case indicates that the fraud order statute was not designed to permit the Postmaster General to resolve differences of opinions between two schools of medical thought as to matters not susceptible of factual proof.[17] Certainly, the mere availability to the defendants on a charge of medical fraud of a cooperative medical witness cannot in and of itself suffice to immunize their conduct.

[16] It may be that scientific advance in the fields of psychiatry and neurology since 1902 would not warrant a similar assumption today.

[17] Although it may be hard to distinguish *in vacuo* between the two types of conflicting medical testimony, little difficulty is encountered in practice in differentiating between a subject as to which reputable scientists disagree and those in which a purveyor of a nostrum is able to produce "experts" to testify in his behalf. This case clearly falls in the latter category. See pp. 37–38, *infra*.

Until this case, the courts have repeatedly rebuffed attempts to draw from the *McAnnulty* case doctrines that would impose additional limitations upon the substantial evidence rule in determining the propriety of administrative action taken against fraudulent drugs and cosmetics. The decision below goes flatly against this weight of authority. Unless it is reversed, the principles it purports to derive from the *McAnnulty* case will effectively cripple action not only by the Postmaster General, but also by the Federal Trade Commission and the Food and Drug Administration, against sellers of fraudulent nostrums and remedies.

III

There Was No Conflict in the Testimony Here As to the Basic Elements of the Fraud

Even if there were some merit in respondents' contention that a conflict in medical testimony renders such evidence incompetent, the finding of the Postmaster General should be upheld. The evidence in this case shows no conflict of opinion on the basic propositions which proved the fraud.

Although there was an intimation that kelp had once been thought useful in reducing, the medical expert called by respondent, a general practitioner and admittedly not a specialist in obesity or an expert in the field of metabolism (R. II, 194), testified that if it had any value for that purpose such value lay in its iodine content (R. II, 176). He

admitted that where iodine is prescribed to affect metabolism, it is in a different form and in a quantity vastly greater than the infinitesimal amount contained in a half teaspoonful of seaweed (R. II, 192, 197, 185–8). Although he deduced that even such a small amount of iodine would increase metabolism "slightly" (R. II, 204, 207–8), he admitted that neither he nor any medical authority with which he was familiar had ever prescribed such an amount (R. II, 208–10, 214). In addition, he admitted that the effect of the iodine would not be felt for "weeks" (R. II, 200). In view of these admissions, the differences of opinion among the experts as to the effect of iodine upon weight when prescribed in proper form and in adequate quantities was clearly immaterial. For the amount of iodine in kelp would obviously be of no consequence, even assuming the correctness of his statements, in any reduction of weight. Thus, the kelp was in fact worthless, as the Government's witness stated.

Respondents' expert also stated that the iodine in Kelp-I-Dine "will increase the appetite a little" (R. II, 203), a statement hardly consistent with his remark on direct examination that respondents' plan would curb the appetite (R. II, 176–7). And his statement that the diet was "severe" and "rigid" (R. II, 200), containing only a thousand calories (R. II, 170) (less than half the average American diet (R. II, 55)) is

not consistent with his earlier statement that the diet is "easy"—and with the representation in respondents' advertising to that effect. His concession that it would be harmful to give the diet to persons having tuberculosis, anemia or heart trouble (R. II, 184) is also inconsistent with hi earlier testimony, made without qualification, that the plan was safe (R. II, 179)—and with respondents' advertising to that effect.

Even if the court below had been correct in excluding the medical testimony from consideration in determining whether or not there was substantial evidence to support the fraud order, it should nevertheless, have sustained the Postmaster General. The advertisements, together with the copy of respondent's diet, in themselves constitute substantial evidence of fraud. As the advertisements of the Plan show, the purchaser of the "Kelp-I-Dine Reducing Plan" is led to believe that through it he will lose weight rapidly without materially changing his diet. They suggest a magic formula which will permit him his usual dietary indulgences but will simultaneously give him the lissome figure he desires. Their theme is always that one can painlessly, without self discipline, and with only minor adjustments in one's diet, lose weight rapidly, safely and easily. In fact, the overweight person who buys the Plan finds that he is required to go on a stringent diet from which has been eliminated most of the fattening items of food to which he

is addicted. *Supra*, pp. 6–7, where the diet recommended by respondent is reproduced (R. 26–27). The most cursory examination of this recommended regimen shows that one cannot follow it and also "eat plenty." Alone, it is sufficient evidence of fraud to support the action taken.

It is thus apparent that there was no real conflict in the expert testimony as to the worthlessness of the kelp in contributing to the loss of weight advertised by respondent or as to the severity of the diet, which were the basic matters as to which respondents' advertisements were deceptive. No honest differences of opinion, no controversial schools of thought nor any of the other indicia of lack of knowledge which might provide an occasion for the use of the doctrine of the *McAnnulty* case were brought to light. Far from showing two schools of thought the evidence in this case revealed the complete lack of controversy in the medical world on the basic points involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the cause remanded to the District Court with direction to dismiss the complaint.

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